

(2)
No. 88-237

Supreme Court, U.S.

FILED

OCT 6 1988

JOSEPH E. SPANIO, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

PAUL EMILE NOEL,

Petitioner,

-against-

DEPARTMENT OF SANITATION OF THE
CITY OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO A
PETITION FOR A WRIT OF CERTIORARI TO
THE APPELLATE TERM OF THE NEW YORK
SUPREME COURT, FIRST DEPARTMENT

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ALAN G. KRAMS,
of Counsel.

*Counsel of Record

28072

QUESTIONS PRESENTED

1. Does this Court have jurisdiction to issue a writ of certiorari when petitioner failed to ask a higher State appellate tribunal to exercise its discretionary authority to review the order challenged by petitioner?

2. Is any federal question raised by petitioner when his lawsuit is based on alleged negligence causing loss of his property, and the suit was dismissed as barred by a statute of limitations requiring such actions to be brought within one year and ninety days after the events at issue?



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THE HISTORY OF THE

REIGN OF

CHARLES THE FIRST

BY

JOHN BURNET

OF

THE UNIVERSITY OF OXFORD

IN TWO VOLUMES

LONDON

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Vol. I.

CHAP. I.

THE

REIGN OF

CHARLES THE FIRST

IN THE

YEAR

1625.

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No. 88-237

IN THE
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OCTOBER TERM, 1988

PAUL EMILE NOEL,

Petitioner,

-against-

DEPARTMENT OF SANITATION OF THE
CITY OF NEW YORK,

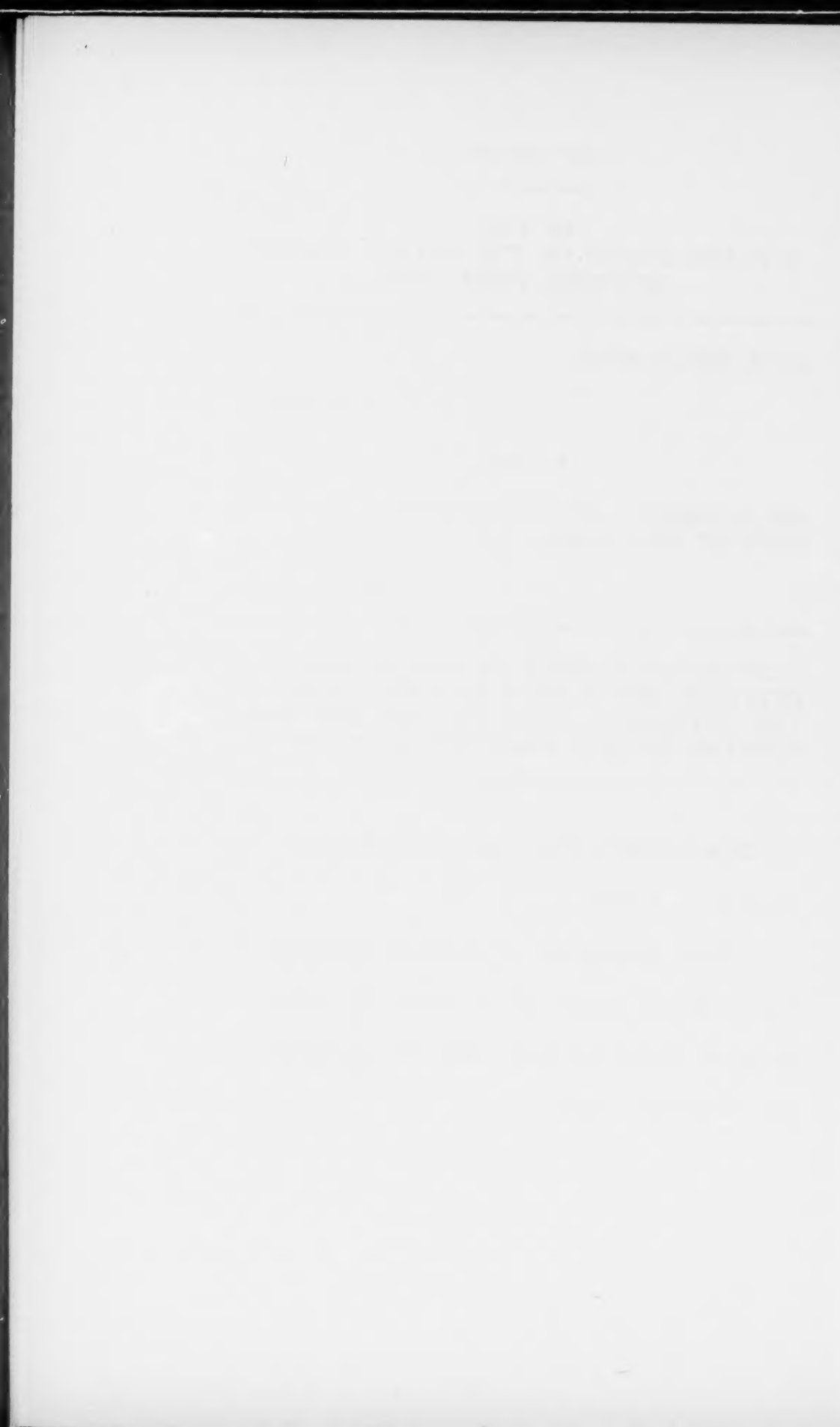
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO A
PETITION FOR A WRIT OF CERTIORARI TO
THE APPELLATE TERM OF THE NEW YORK
SUPREME COURT, FIRST DEPARTMENT

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1257:

Final judgments or decrees rendered by
the highest court of a State in which a
decision could be had, may be reviewed by
the Supreme Court.



STATEMENT OF THE CASE

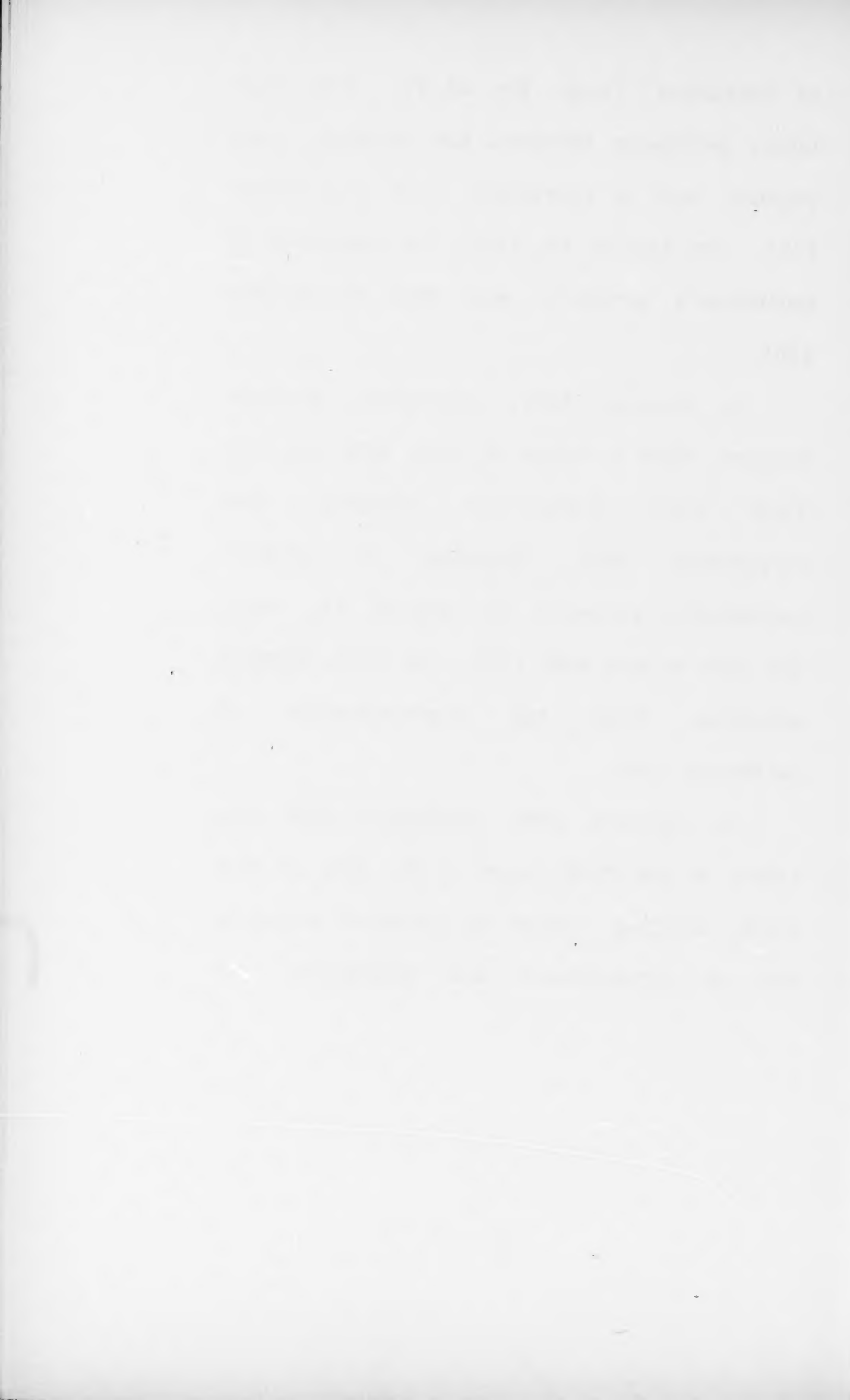
On June 1, 1981, a marshal evicted petitioner from his apartment pursuant to a valid warrant issued in an eviction action filed in the Civil Court of the City of New York (14).¹ (Appellant's Brief to the Appellate Term of the New York Supreme Court at 7, 16) (hereinafter "App. Br."). The marshal left a notice advising petitioner to contact the New York City Department of Sanitation to locate the property that was removed from his apartment (App. Br. at 9). The notice advised plaintiff that "your property will be held for a period of approximately 30 days and unless called for will be sold or otherwise disposed of by the Bureau of Encumbrances of the Department

¹Numbers in parentheses refer to pages in the Record on Appeal to the Appellate Term of the New York Supreme Court.

of Sanitation" (App. Br. at 9). Two days later, petitioner obtained his clothing, some papers, and a typewriter from respondent (25). On August 24, 1981, the remainder of petitioner's property was sold at auction (26).

In October 1981, petitioner, through counsel, filed a notice of claim with the New York City Comptroller alleging that respondent had "damaged or stolen" petitioner's property on August 24, 1981, the date it was sold (27). In 1982, counsel withdrew from his representation of petitioner (20).

In January 1985, petitioner filed this action in the Civil Court of the City of New York, alleging "[l]oss of personal property due to carelessness and negligence" by



respondent on or about the sale date (A-1).² Respondent's answer denies the allegations in the complaint and raises two affirmative defenses: (1) that the suit is barred by the one-year and ninety-day statute of limitations in section 50-i of the New York General Municipal Law and (2) that the summons and complaint were not properly served (Supplemental Record on Appeal to the Appellate Term at 1).

Trial was scheduled for December 4, 1986; respondent did not appear, and an inquest was held (10). The Trial Judge offered to adjourn the case to enable petitioner, appearing pro se, to seek counsel, but petitioner insisted on proceeding (12). He reiterated that he was

²Numbers preceded by the letter "A" refer to pages in the Appendix annexed to this brief.

The first part of the book is devoted to a general
survey of the history of the world, from the
beginning of time to the present day. The author
discusses the various stages of human civilization,
from the earliest times to the present day. He
shows how the human race has progressed from
a state of barbarism to a state of civilization,
and how the various nations of the world have
developed their own distinct characteristics.
The second part of the book is devoted to a
detailed description of the various nations of the
world, from the most ancient to the most modern.
The author describes the customs, manners, and
institutions of each nation, and shows how they
have changed from time to time. The third part
of the book is devoted to a description of the
various religions of the world, from the most
ancient to the most modern. The author
describes the doctrines and practices of each
religion, and shows how they have changed
from time to time.

The fourth part of the book is devoted to a
description of the various sciences of the world,
from the most ancient to the most modern. The
author describes the principles and practices of
each science, and shows how they have changed
from time to time. The fifth part of the book
is devoted to a description of the various arts
of the world, from the most ancient to the most
modern. The author describes the principles and
practices of each art, and shows how they have
changed from time to time. The sixth part of
the book is devoted to a description of the
various governments of the world, from the most
ancient to the most modern. The author
describes the principles and practices of each
government, and shows how they have changed
from time to time.

The seventh part of the book is devoted to a
description of the various philosophies of the world,
from the most ancient to the most modern. The
author describes the principles and practices of
each philosophy, and shows how they have changed
from time to time. The eighth part of the book
is devoted to a description of the various
literatures of the world, from the most ancient to
the most modern. The author describes the
principles and practices of each literature, and
shows how they have changed from time to time.

complaining about "carelessness and negligence" by respondent (A-3) and was allowed to submit various documents as evidence (8 15-17, 25-27). The Trial Judge asked petitioner if he had any further testimony or documents to offer, and plaintiff said he had nothing more (17). The Court dismissed the complaint as untimely, saying "[t]he notice of claim was served in 1981 and the notice and the summonse [sic] and complaint in 1985" (18).

Petitioner appealed to the Appellate Term of the New York Supreme Court, First Department, which unanimously affirmed the Civil Court's judgment, without opinion. Pet. for Cert. at 3a. Petitioner then moved before the Appellate Term for leave to appeal to the Appellate Division of the New York Supreme Court, and respondent opposed, arguing inter alia, that the motion was

untimely (A-7, A-9). The motion was denied (A-6).

Petitioner never pursued further review in the State appellate courts, as he was entitled to do. Instead, he filed this Petition for Certiorari with this Court.

SUMMARY OF ARGUMENT

This Court lacks jurisdiction to issue a writ of certiorari because petitioner has not sought relief from the highest court in New York in which a decision could be had. Petitioner has never asked the Appellate Division of the New York Supreme Court to exercise its discretion to review the Appellate Term's order.

Moreover, the petition does not raise any colorable federal claims. Petitioner's lawsuit, which sounds in negligence, was dismissed as barred by the one year and 90-day statute of limitations. The enactment of limitations statutes to control actions

based on state law is a state prerogative, raising no constitutional issues. Nor do the merits of this tort action provide any basis for granting certiorari. Since negligent acts of government officers are not actionable as violations of the Due Process Clause, and no other constitutional provision is implicated here, there are no federal issues for this Court to review.

REASONS WHY THE WRIT SHOULD BE DENIED

POINT I

THIS COURT LACKS JURISDICTION TO GRANT CERTIORARI BECAUSE THE DECISION SOUGHT TO BE REVIEWED IS NOT FROM THE HIGHEST STATE COURT IN WHICH A DECISION COULD BE HAD.

This Court's certiorari jurisdiction over State courts is limited to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. §1257. When a petitioner fails to ask a higher state appellate tribunal to

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exercise its discretionary authority to review the ruling of a lower appellate court, this Court lacks jurisdiction to grant certiorari. See Banks v. California, 395 U.S. 708 (1969); Stratton v. Stratton, 239 U.S. 55, 56-57 (1915).

In New York practice, an order of the Appellate Term of Supreme Court is reviewable by the Appellate Division of the Supreme Court "by permission of the appellate term or, in case of refusal, of the appellate division." N.Y. Civ. Prac. Law §5703(a).

Petitioner sought the Appellate Term's permission to appeal to the Appellate Division and was denied; however, he never asked the Appellate Division to exercise its discretion to review the Appellate Term order. Accordingly, this Court has no jurisdiction to review the Appellate Term's order, and the petition must be denied.



POINT II

PETITIONER'S ACTION ALLEGES GOVERNMENTAL NEGLIGENCE AND RAISES NO FEDERAL CLAIMS.

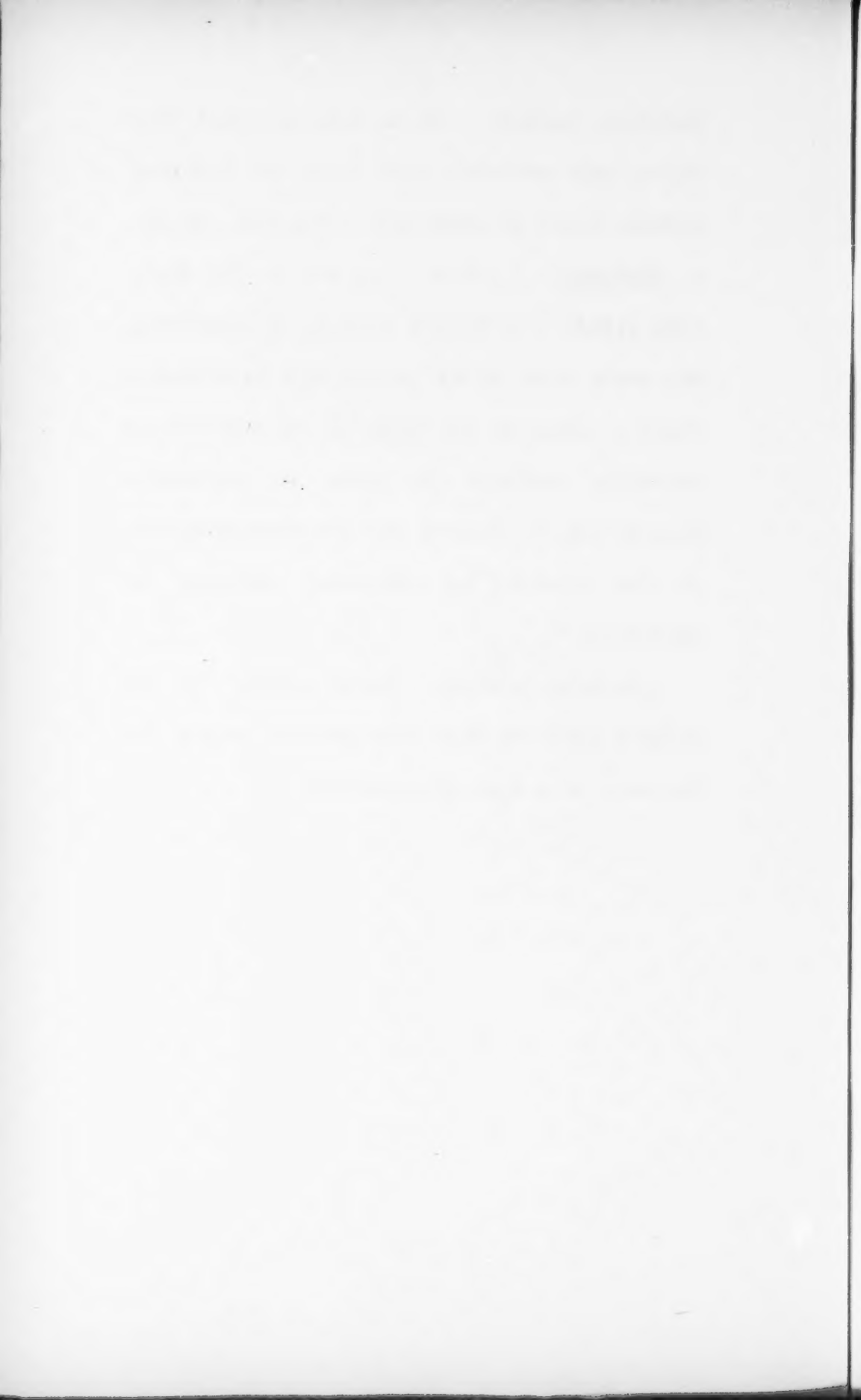
Petitioner complains that respondent negligently disposed of petitioner's property while it was being stored by respondent after a marshal executed a warrant of eviction against petitioner and brought petitioner's property to respondent's warehouse. (A-1, A-3). Even if true, this claim raises no federal issues. In Daniels v. Williams, 474 U.S. 327, 334 (1986), this Court held that a "mere lack of care . . . does not implicate the Due Process Clause of the Fourteenth Amendment." There are no other provisions of the Constitution implicated by petitioner's claim.

Nor can petitioner complain that the merits of his suit were not reached because of the one year and 90-day statute of



limitation period. It is unquestioned that states may establish time limits for bringing actions based on state law. See Sun Oil Co. v. Wortman, ___ U.S. ___, 108 S. Ct. 2117, 2126 (1988) ("A State's interest in regulating the work level of its courts and determining when a claim is too stale to be adjudicated certainly suffices to give it legislative jurisdiction to control the remedies available in its courts by imposing statutes of limitations.")

Briefly stated, there simply is no federal claim in this case and no reason for issuance of a writ of certiorari.



CONCLUSION

**THE PETITION FOR A WRIT OF
CERTIORARI SHOULD BE DENIED.**

October 4, 1988

Respectfully submitted,

PETER L. ZIMROTH,
Corporation Counsel of the
City of New York,
Attorney for Respondent.

LEONARD J. KOERNER,*
FAY LEOUSSIS,
ALAN G. KRAMS,
of Counsel.

*Counsel of Record.

PETITIONER'S ENDORSED COMPLAINT

Claim T-11914

Plaintiff: Paul Emile Noel
Mailing Address: 648 East 40th Street
Brooklyn, New York
11203

Living Address: 116 Williams Avenue
Brooklyn, New York
11207

Defendant: The Department of
Sanitation of the City
of New York

Cause of Action: Loss of personal property due to carelessness and negligence of the Department of Sanitation of the City of New York and, it was on or about the 24th day of August 1981 at 172 Vanderbilt Avenue, Brooklyn, New York, my personal property was damaged or stolen while in the possession of the City of New York, Department of Sanitation of the City of New York, their agents, servants and employees; and the damage claimed is personal property consisting of three rooms of furniture and furnishings in addition to 1 Stereo, 1 Television Set, bookcases, kitchen utensils etc. . . evaluating \$25,000. Furniture and articles were located at 825 Crown Street, Apt. B-7, Brooklyn, N.Y. 11213 and they were taken illegally by the Order of the Marshalls, Moshe E. Eisenberg and his partner Jesse A. Gardner since June 1, 1981 and they were also sold at public auction on

8-24-81, RE, Encumbrance Unit,
Department of Sanitation, 125 Worth
Street, New York, N.Y. 10013,
Seizure #J-6595. I want to reimburse
\$25,000.

/s/ Paul Emile Noel



EXCERPT FROM TRANSCRIPT OF TRIAL IN
NEW YORK CITY CIVIL COURT

THE COURT: Please tell me what that arises out of; why do you say that the Department of Sanitation of the City of New York owes you that amount or any amount of money?

THE WITNESS: The legal action that I'm taking against the Department of Sanitation of the City of New York in the amount of \$25,000 is for loss of my personal property due to the carelessness and negligence of its department.

PETITIONER'S MOTION IN APPELLATE TERM FOR
LEAVE TO APPEAL TO APPELLATE
DIVISION

SUPREME COURT OF THE STATE OF NEW
YORK

APPELLATE TERM: FIRST DEPARTMENT

-----X

PAUL EMILE NOEL,

PETITIONER,

v.

DEPARTMENT OF SANITATION OF THE

CITY OF NEW YORK,

DEFENDANT.

-----X

NOTICE OF MOTION

COURT INDEX NO. 4388/85

NY COUNTY CLERK #92407/87

TAKE NOTICE that upon the annexed
affidavit of Paul Emile Noel, sworn on to
June 29, 1988, and the exhibits annexed
thereto, and upon the proceedings heretofore
had herein, petitioner-appellant will move
this Court at a Motion Term at the
Courthouse, located at 60 Centre Street,
New York, New York, on July 7th, 1988 at
10:00 A.M. for permission to appeal to the
appellate Division, First Department from an
order of the appellate Term filed on April 6,



1988, pursuant to the Supreme Court of the United States 21.1(k) which required the opinions of the State Court of Appeals be exhausted in a petition for writ of certiorari received on June 20, 1988.

Dated: June 29, 1988

Paul Emile Noel
Petitioner Pro se
101 Lafayette Avenue,
Apt. 3 E
Brooklyn, N.Y. 11217

TO: Peter L. Zimroth
Corporation Counsel
The City of New York, Law Department
100 Church Street
New York, N.Y. 10007



**APPELLATE TERM ORDER DENYING LEAVE TO
APPEAL**

At an Appellate Term
of the Supreme Court,
first department, held
at the Court House,
Borough of Manhattan,
City of New York, on
the 22nd day of July,
1988.

PRESENT:

HON. JAWN A. SANDIFER, J.P.

HON. STANELY S. OSTRU

HON. EDITH MILLER

Justices.

-----X

PAUL EMILE NOEL,

Plaintiff-Appellant,

-against-

DEPARTMENT OF SANITATION OF
THE CITY OF N.Y.,

Defendant-Respondent.

-----X

ORDER UPON MOTION. .

92407/1987

Cal. No. 87-464

November 1987 Term

The above named appellant having by
notice of motion dated the 29th day of June

1988 moved for an order granting leave to appeal to the Appellate Division - First Dep't from an order of this Court dated April 6, 1988,

Now upon reading and filing said notice of motion and the affidavit of Paul Emile Noel verified the 29th day of June 1988 and the papers annexed in favor of said motion, and the statement of Alan G. Krams affirmed the 5th day of July 1988 and the papers annexed in opposition thereto,

IT IS ORDERED that said motion be and the same hereby is denied with \$10 costs.

Enter,

/s/

Justice, Appellate Term

Supreme Court, first dept.



RESPONDENT'S AFFIRMATION OPPOSING
PETITIONER'S MOTION FOR LEAVE TO
APPEAL

NEW YORK SUPREME COURT
APPELLATE TERM: FIRST DEPARTMENT

PAUL EMILE NOEL,

Plaintiff-Appellant,

-against-

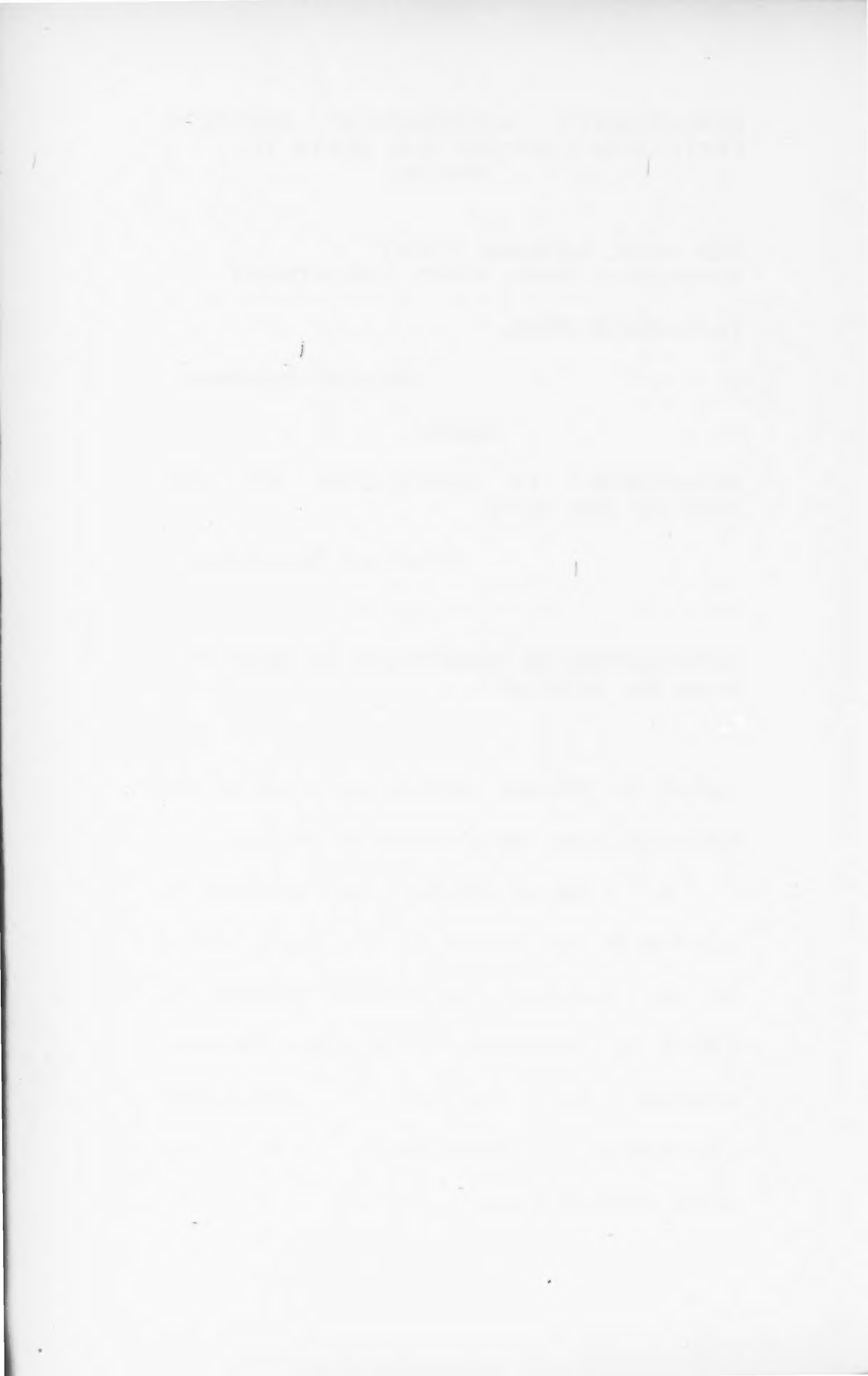
DEPARTMENT OF SANITATION OF THE
CITY OF NEW YORK,

Defendant-Respondent.

AFFIRMATION IN OPPOSITION TO MOTION
Index No. 92407/87

ALAN G. KRAMS, affirms the truth of the
following under the penalties of perjury:

1. I am an attorney duly admitted to
practice in the Courts of this State, and I
am an Assistant Corporation Counsel to
PETER L. ZIMROTH, Corporation Counsel,
attorney for defendant - respondent
(hereinafter "respondent") in the
above-entitled action.



2. This affirmation is submitted in opposition to appellant's motion for leave to appeal to the Appellate Division, First Department from the order of this Court, entered April 6, 1988, unanimously affirming the judgment of the Civil Court, New York County (Schwartz, J.), entered February 25, 1987, dismissing the complaint.

3. Appellant's motion is untimely, and this Court has no jurisdiction to grant leave to appeal. On May 4, 1988, I served appellant with a copy of this Court's order and notice of its entry by mailing it to the address designated by appellant for this purpose. Appellant obviously received it, since he attached a copy of the order and notice of entry to his moving papers. On the same day that I mailed the order and notice of entry to plaintiff, I executed an affirmation attesting to that fact and attached it to my copy of the papers served. Attached hereto as Exhibit 1 are copies of

the order and notice of entry I served on plaintiff as well as my affirmation of service.

4. Since service was by mail, appellant had 35 days from the date of mailing to make his motion for leave to appeal. See CPLR 5513(a); 2103(c); 2103(b)(2). Appellant was required to move for leave to appeal no later than June 8, 1988. His motion, dated June 29, 1988, is obviously untimely and must be denied. See Reinfeld v. 325 West End Corp., 43 AD2d 671 (1st Dept., 1973) (time limits for seeking appeal are not waivable); Ruggiano v. Board of Education, 42 AD2d 911 (2d Dept., 1973) (appeal dismissed where motion for leave in Appellate Term was untimely).

5. Even if appellant's motion were timely, it should not be granted. Appellant makes no attempt to demonstrate that this Court's ruling was erroneous or involves important issues warranting review by the Appellate Division. Respondent refers the

Court to the brief it filed on this appeal for a statement of the reasons why the Civil Court's order was properly affirmed. Respondent's brief is annexed as Exhibit 2.

WHEREFORE, it is respectfully requested that appellant's motion be denied.

Dated: New York, New York
July 5, 1988

/s/

ALAN G. KRAMS